

No. 7275

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

POULTRY PRODUCERS OF CENTRAL CALIFORNIA  
(a corporation),

*Appellant,*

vs.

MOTORSHIP "HINDANGER", her tackle, en-  
gines, boilers, etc., and WESTFAL-LARSEN  
& Co. (a corporation),

*Appellees,*

and

WASHINGTON COOPERATIVE EGG AND POULTRY  
ASSOCIATION (a corporation),

*Appellant,*

vs.

MOTORSHIP "HINDANGER", her tackle, en-  
gines, boilers, etc., and WESTFAL-LARSEN  
& Co. (a corporation),

*Appellees.*

APPELLANTS' PETITION FOR A REHEARING.

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FILED  
APR 12 1935

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## APPELLANTS' PETITION FOR A REHEARING.

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*To the Honorable Curtis D. Wilbur, Presiding Judge,  
and to the Associate Judges of the United States  
Circuit Court of Appeals for the Ninth Circuit:*

Come now appellants above-named and respectfully  
petition for a rehearing of the decision herein on the  
grounds herein stated.

Appellants respectfully petition for a rehearing in this proceeding for the reason that this court based its opinion on the assumption that the bill of lading was the contract between the parties, in spite of the fact there was no evidence from which its issuance by respondents or acceptance by appellants *as a contract* could be implied, and in the face of the fact that the evidence established that both appellants and respondents *believed* that the shipment was moving under an oral contract and the bill of lading was issued and accepted merely as a receipt. The decisions cited by appellants showing that such an assumption is contrary to the authorities apparently were overlooked by the court in rendering its opinion.

There was no conflict in the evidence as to the existence of some oral contract for the affreightment of these eggs. The only conflict was whether the contract was made by respondents with libelants or with one Walter Van Bokkelen. The evidence as to this is to be found in the testimony of Mr. Wintemute, vice-president in charge of traffic for General Steamship Corporation, the agent of respondents, and Mr. Lawler, manager of Poultry Producers of Central California.

Appellants concede that there is a conflict in the testimony of the two conversations held in March, 1930,—the first between Wintemute, representing the respondents, and Van Bokkelen, on March 8th; the second between Wintemute, representing the respondents, and Lawler, representing the libelants, on March 10th. This conflict is not, however, as to the fact of the consummation of an oral contract by those

negotiations. The sole conflict is as to whether the oral contract, admittedly consummated with someone, was between respondents and Van Bokkelen or between respondents and libelants. In our opening brief we summarized the testimony relating to these negotiations. To show that the entire probative force of this testimony was to demonstrate the making of an oral contract with someone, we will set out sufficient of the Apostles on Appeal to show the substance of the testimony, first, of Wintemute, and then of Lawler, with reference to these negotiations, Wintemute and Lawler being the only witnesses who testified with reference to these conversations.

In this connection we desire to point out that the testimony of Wintemute, quoted in the opinion of this court, to the effect that the conversations with Mr. Benjamin did not result in the booking of any cargo *at that time*,—to-wit: on or before February 15, 1930,— is not inconsistent with our position as to the content of the record, since we have never claimed that an oral contract was made prior to March, 1930. (See Brief for Appellants, page 29.)

Mr. Wintemute testified as follows:

“A. On the morning of March 8th Mr. Walter Van Bokkelen arrived in San Francisco and called on me, stating that he had just come from the East by plane. I had been in telegraphic communication with him and wondered how he got here so soon. He told me that he was now prepared to ship 15,000 cases of eggs on the motorship ‘Hindanger’, that he wanted to give (254) us these eggs to carry out a promise made Mr. Von Erpecom, managing director of Messrs.

Westfal, Larsen & Company, made to Mr. Von Erpecom in London, at which time Mr. Van Bokkelen had discussed with Mr. Von Erpecom the possibility of Westfal, Larsen Company allocating to Mr. Van Bokkelen for operation in the Blavin line operated by Mr. Van Bokkelen between New York and Buenos Aires, the last two of the new ships then being built by Westfal, Larsen Company for the trade between the Pacific Coast and Argentine and Brazil. Mr. Van Bokkelen said he wanted to carry out his promise to Mr. Von Erpecom to give us a shipment of eggs, and accordingly he said he would ship 15,000 cases, that he was arranging with the egg people, the Pacific Egg Producers, to ship the eggs.

Q. *At that time, Mr. Wintemute, did you close a contract with Mr. Van Bokkelen or not?*

A. *Verbally, yes.*

Q. Did you agree on the rate?

A. Yes.

Q. What did you tell him the expected sailing of the 'Hindanger' from Puget Sound to San Francisco would be?

A. We told him that the ship, as near as we could figure then, was expected to sail from Seattle March 24, and from San Francisco, April 4.

Q. At the time you made this representation to Mr. Van Bokkelen, was the vessel in such a position that you could reasonably expect that the representations could be carried out?

A. Yes.

Q. Following the making of the contract with Mr. Van Bokkelen for the carriage of these eggs, did you have any communication with the Pacific Egg Producers?



A. Yes, on my instruction, Mr. Riali directed a letter to the Pacific Egg Producers, confirming the arrangement with Mr. Van Bokkelen and asking for their confirmation.

Q. Do you know whether Mr. Riali carried out your instructions and communicated with the Pacific Egg Producers?

A. I believe he did.

Q. - Did you see the letter that was written?

A. I saw the copy (255).

Q. I will show you a letter dated March 12 and ask you if that is a copy of the letter written by Mr. Riali to the Pacific Egg Producers?

A. That is.

Q. Is that the letter that was written in accordance with your instructions, following the meeting with Mr. Van Bokkelen in which he had made the booking with you in which you asked them to confirm whether they would supply the eggs under the booking?

A. Yes."

(Page 297 et seq. of Apostles on Appeal.)

Mr. Lawler's testimony with reference to the conversation of March 10th with Mr. Wintemute was as follows:

"Q. What was stated in that conversation, Mr. Lawler?

A. I confirmed the space on the 'Hindanger' which had been arranged for on the Saturday previous by Mr. Van Bokkelen.

Q. What did you tell him?

A. I told him that we would ship from ten to fifteen thousand cases of eggs on the 'Hindanger'.

Q. Was the rate agreed upon?

A. The rate was agreed upon some time prior to that. I had no negotiations on the rate as far as I can remember.

Q. Had you been advised as to it?

A. Yes, I had; if I remember correctly I had a wire from New York that the rate had been agreed to.

Q. Were these eggs that were shipped shipped at that rate?

A. Yes.

Q. Did Mr. Wintemute accept the confirmation of the space?

A. Yes.

Q. At that time did you have in mind the statements that had been made in reference to the time of transit of this vessel?

A. In that respect I could give you the same information that has already been given to you by Mr. Rother.

Q. What did you have in mind?

A. About 35 days in transit. The boat had been somewhat delayed, if I remember correctly, it was somewhere around the first of April, that would bring it in—at least the first part of May.

Q. Did the information that you had as to the sailing date and the time of the voyage have anything to do with your confirmation of this space?

A. The time element was one of the most important elements in this whole thing.

Q. Mr. Lawler, did you make the contract for the shipment of these eggs on that date?

A. The contract with whom?

Q. With Westfal, Larsen & Company through the General Steamship Corporation?

A. The contract, or the arrangement was made with (229) Walter Van Bokkelen and he tele-

phoned that I had to confirm it with Mr. Wintemute.

Q. Did you confirm it?

A. Yes.

Q. And it was made on behalf of the Poultry Producers of Central California—

Mr. Graham. Do not lead the witness.

Mr. Sapiro. On whose behalf was that contract made?

A. I do not believe it was specifically made on behalf of the Poultry Producers or Pacific Egg Producers, but I think that being a commercial concern, that was not the worry of Mr. Wintemute particularly, whether I was taking it on behalf of the Poultry Producers of Central California, or the Pacific Egg Producers.

Q. Was there a definite amount agreed upon?

A. The amount was left open, between ten thousand and fifteen thousand cases, because it was doubtful whether or not the Washington Cooperative would be able at that time to go through with their part of it. That is the reason why there was a minimum of ten thousand and a maximum of fifteen thousand arranged for.

Q. Was the 10,000 minimum guaranteed?

A. Yes, the 10,000 minimum was guaranteed because our association, the Poultry Producers of Central California, could ship that many without any assistance from the Washington Cooperative.

Q. Was it agreed in that conversation that you would give them at least ten thousand?

A. Yes.

Q. You did ship eleven thousand, as a matter of fact?

A. Yes.

Q. Now the conversation that you had on that date when the confirmation was made, was that in reference to this shipment on the 'Hindanger'?

A. Yes.

Q. It referred to the shipment that subsequently went out?

A. Yes."

(262-264, Apostles on Appeal.)

Comparing these two conversations, it is obvious that the only witnesses testifying as to the negotiations on the 8th and 10th of March testified that an oral contract resulted, Wintemute testifying expressly that on March 8th he closed a contract verbally with Van Bokkelen for the shipment of these very eggs to be furnished by appellants under that contract, and Lawler testifying positively that on the 10th he agreed to ship from 10,000 to 15,000 cases of eggs at the rate previously agreed upon and that Wintemute accepted this confirmation of space. Thus the sole conflict in the evidence is as to the party with whom the respondents' oral contract for the transportation of the eggs here in suit was made.

In stating that "the record conclusively establishes that appellants were both the owners and shippers of the eggs in question", the opinion of this court impliedly rejects as inherently unbelievable the testimony of Wintemute that Van Bokkelen was the real shipper and that libelants merely agreed to furnish the eggs under Van Bokkelen's contract. We respectfully submit that this does not, however, answer the question of law raised by our appeal, to-wit: whether when all the testimony showed that the bill of lading

was issued and accepted by parties who believed that it was issued and accepted merely as a receipt and document of title given pursuant to a prior complete oral contract of affreightment, the bill of lading could, as a matter of law, determine the rights of the parties.

At pages 16 to 27 of the Brief for Appellants we analyzed authoritative cases showing that the existence of an oral contract for the transportation of these eggs with either appellants or a third person would prevent the bill of lading being accepted as the contract of the parties, or as anything other than a receipt and document of title. We will not repeat the analysis of the following cases contained in our brief.

*Northern Pacific R. Co. v. American Trading*

*Co.*, 195 U. S. 439, 25 S. Ct. Rep. 84;

*Bostwick v. B. & O. R. Co.*, 45 N. Y. 712;

*Mar Mediterraneo*, 1 F. (2d) 459;

*Isle de Sumatra*, 286 Fed. 436;

*Julia Luckenbach*, 1923 A. M. C. 479;

*Arctic Bird*, 109 Fed. 167;

*Citta di Palermo*, 153 Fed. 378;

*Burns v. Burns*, 131 Fed. 238;

*Thompson on Bills of Lading*.

These authorities all rest upon the proposition that to constitute a contract the bill of lading must be accepted as such, expressly or impliedly, and such a bill of lading is held not to have been accepted as a contract in cases where the goods were delivered to the vessel pursuant to a prior oral contract of affreightment in the absence of some express showing that it was so accepted. There is not one word of testimony in this case showing any intention to supersede, by the

bills of lading as a contract, the oral contract pursuant to which these goods were delivered to the ship.

The opinion of this court fails to consider any of the authorities cited, although they include a decision of the United States Supreme Court and earlier decisions of this court. The opinion simply assumes that if there was evidence to sustain the Master's finding that no oral contract was made between these parties, because there was no meeting of the minds, then the bills of lading determined the rights of the parties as a matter of law. Such a holding is contrary in principle to the controlling authorities cited by us.

To hold that no oral contract was proved in this case not only ignores the positive testimony that the negotiations of March 8th and March 10th resulted in a contract with someone, but also decides the case upon a different factual premise than that conceded by both parties at the trial of the action and upon brief. We have heretofore set forth at page 22 of our brief on appeal respondents' theory at the trial that an oral contract with Van Bokkelen resulted from the negotiations of March 8th and March 10th. It has, of course, been appellants' position at all times that these negotiations resulted in an oral contract between libelants and respondents. To now hold that the negotiations of March 8th and 10th resulted in no oral contract with anyone is to decide the appeal on a different factual premise than that assumed by all parties to exist at the trial of the action. This is contrary to law.

*Brown v. Gurney*, 201 U. S. 184, 26 S. Ct. Rep. 509;

*U. S. S. B. E. F. Corp. v. South Atlantic Drydock Co.*, 19 F. (2d) 486;

*U. S. v. Lcerburger* (C. C. A. 8th), 160 Fed. 651.

However, even if this court should consider that no actual contract resulted from the negotiations of March 8th and 10th, there is still no room for a finding that the bill of lading determines the rights of the parties unless the very foundation of the cases analyzed by us is swept aside; namely, that to determine the rights of the parties the bill of lading must be accepted, expressly or impliedly, as the contract. At no time have respondents suggested any authority which would support the proposition that when both shipper and carrier believed that the bill of lading was issued only as a receipt and document of title under a preexisting complete oral contract, it nevertheless determines the rights of the parties. Yet this is the very rule of law made by this decision without citation of authorities. We respectfully submit that it is a radical departure from the principle established by the cases upon which we rely, and that on reconsideration upon this petition it should be reversed.

Dated, San Francisco.

April 12, 1935.

Respectfully submitted,

CARL R. SCHVITZ,

MILTON D. SAPIRO,

*Counsel for Appellants  
and Petitioners.*

## CERTIFICATE OF COUNSEL.

I hereby certify that I am of counsel for appellants and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,  
April 12, 1935.

CARL R. SCHULZ,  
*Of Counsel for Appellants  
and Petitioners.*